Supreme Court, U.S.
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No. 00-9

In The

Supreme Court of the United States

GEMINI, INC.,

Petitioner,

v.

KATHERINE A. THORSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

DALE L. PUTNAM
Counsel of Record
PUTNAM LAW OFFICE
518 Montgomery Street
P. O. Box 70
Decorah, Iowa 52101
(319) 382-2984

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S.Rep. No. 103-3, at 28 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 30 5

STATEMENT OF THE CASE

Respondent Thorson disagrees with the Statement of the Case as set forth by Petitioner Gemini, Inc. Gemini claims that the principle question in this case is whether the FMLA bars an employer from introducing after-acquired evidence to contradict an employee's FMLA claim because the employer did not go through the certification procedure. The District Court specifically allowed after-acquired evidence and took in to account the after-acquired evidence presented by Gemini before entering summary judgment for Thorson on the issue of liability. App., 35a-37a. The decision of the District Court in granting Summary Judgment after evaluating the medical evidence provided by Gemini was specifically addressed by the Eighth Circuit Court of Appeals and the decision of the District Court was upheld. App., 18a-19a. Further, at no time did the Court of Appeals expand the scope of the statute beyond the limits envisioned by Congress, but elected to follow the DOL's rules and regulations as has every other Court faced with the similar question. App., 12a-16a.

Factual Background

In addition to the factual background set forth by Gemini, Thorson would point to the following:

At the time Gemini terminated Thorson, Gemini had been presented two doctors orders telling Thorson not to work. App., 3a, 17a, 28a, 29a. Gemini made no inquiry as to Thorson's medical condition or no FMLA inquiry when it terminated Thorson on February 18, four days after she returned to work. App., 18a, 19a, 35a, 36a. No request for

a certification from her doctor was made, nor any request for independent medical examinations was made by Gemini, as allowed by the FMLA. App., 18a, 19a, 35a, 36a. Two years following Thorson's termination, during the course of this litigation, Gemini obtained medical opinions from two doctors, both which were presented by Affidavit and considered by the District Court at the time of the Thorson's Motion for Summary Judgment. App., 18a, 19a, 35a, 36a.

The Court Of Appeals' Decision

Thorson also takes dispute with Gemini's recitation of the Court of Appeals decision. Specifically, the Court of Appeals never held that after-acquired evidence could not be introduced nor did it ever bar Gemini from offering after-acquired evidence. In fact, just the opposite is true in that the District Court specifically commented on the after-acquired evidence which Gemini filed as exhibits to the Resistance to Motion for Summary Judgment. App., 35a, 36a. This same evidence was considered and discussed by the Court of Appeals in discussing the weakness of evidence obtained two years after the fact versus the contemporaneous examinations by Thorson's doctor. App., 18a, 19a.

REASONS FOR DENYING THE WRIT

I. The lower Federal and State Courts are not divided over the question whether employers may use after-acquired evidence to defeat an employee's FMLA claim and this is not an issue in this case.

To begin this argument, it must once again be pointed out that Gemini's position is factually incorrect. The District Court did allow after-acquired evidence, and the Court of Appeals commented on and ruled on the after-acquired evidence. App., 18a, 19a, 35a, 36a. The District Court held "When a doctor tells a person to stay home from work, the employee is justified in believing that she not return to work, even though hindsight might prove otherwise." App., 36a. The District Court found Gemini's reliance on two doctors' opinions conducted two years after the illness versus two contemporaneous examinations where the doctor advised his patient not to return to work did not generate a jury question. App., 36a.

The Court of Appeals specifically found in evaluating the after-acquired evidence "In the face of the contemporaneous notes from Thorson's physician indicating that she was not to work, we agree with the District Court that Gemini can not show, with its evaluations made long after the fact, that there remains a genuine issue of material fact on the question of Thorson's capacity to perform her job." App., 19a.

This ruling is totally consistent with all of the Courts that have considered this specific issue. Specifically, in Gemini's cited case *Bauer v. Variety Dayton-Walther Corp.*,

118 F.3d 1109, 1112 (6th Cir. 1997), the Sixth Circuit, like the Eight Circuit allowed the after-acquired evidence. *Id.*

Where the authorities cited by Gemini, *Delong v. Trujillo*, 1 P.3d 195 (Colo. Ct. App.1999), *cert. granted* (May 30, 2000) and *Williams v. Rubicon, Inc.*, P.754 So. 2d 1081 (La. Ct. App. 1999), *writ denied*, 754 So. 2d 864 (La. 2000) and *Price v. City of Fort Wayne*, 117 F.3d 1022 (7th Cir. 1997) differ from this case is that they all dealt with the Certification process. At no time was the Certification process under FMLA at issue in this case, as Gemini did not request a Certification, did not request further medical evaluations, and did not even consider the medical condition of Thorson at the time it terminated her. App., 18a, 19a, 35a, 36a. The Eighth Circuit never held in that the Certification process is required and is the only way to present evidence. In fact, the Eighth Circuit discussed and reviewed after-acquired evidence that was introduced to the District Court at the time of the Summary Judgment Hearing. App., 18a, 19a. This case quite simply does not generate any issues that are divided between any courts.

II. The Court of Appeals did not hold that agency rule making is not constrained by Congressionally established limits.

A review of Eighth Circuit's opinion in this case shows that its analysis of this issue was exhaustive. The Eighth Circuit, began by citing the Senate report, "The term 'serious health condition' is not intended to cover short term conditions for which treatment and recovery are very brief. It is expected that such conditions will fall

within even the most modest sick leave policies. Conditions or medical procedures that would *not normally* be covered by the legislation include minor illnesses which last only a few days . . . " Emphasis added. S. Rep. No. 103-3, at 28 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 30. The Report went on to hold "The definition of 'serious health condition' . . . is broad and intended to cover various types of physical and mental conditions." *Id.* The Eighth Circuit held "We do not believe this legislative history assists Gemini all that much. While Congress may have 'expected' that minor illesses 'normally' would not come within the definition of 'serious health condition', that does not mean such ailments can never be FMLA serious health conditions." App., 14a.

As the Eighth Circuit noted, Thorson's treating physician originally thought she was suffering from a peptic ulcer or gall bladder disease, conditions that would be quite serious under any definition. App., 15a. Until February 11, Thorson's physician believed she could have a potentially serious condition, which was not ruled out until March 9, long after Thorson had been terminated from her position by Gemini. App., 13a.

The Eighth Circuit's opinion in this case is consistent with each and every case decided under the FMLA with the Courts all applying the bright line/two prong test contained in the Code of Federal Regulations. In *Martyszenko v. Safeway, Inc.*, 120 F.3d 120, 123 (8th Cir. 1997) the Court did the following analysis:

> "Uniformly, Courts applying the FMLA expressly or impliedly have required a showing of incapacity. See *Hodgens v. General Dynamics*

Corp., 963 F. Supp. 102, 106 (D.R.I. 1997) (holding no FMLA breach where employee's "condition did not prevent him from performing his job"), *Boyce v. New York City Mission Soc'y*, 963 F. Supp. 290, 299 (S.D.N.Y. 1997) (recognizing the requirement of incapacity; holding plaintiff's shortness of breath and chest pains failed to meet the FMLA standard); *Rhoads v. FDIC*, 956 F. Supp. 1239, 1255 (D.Md. 1997) (denying employer's documented chronic health condition" caused "episodic periods of incapacity"); *Kaylor v. Fannin Reg'l Hosp.*, 946 F. Supp. 988, 997-98 (N.D.Ga. 1996) (finding plaintiff's back injury to be a "serious health condition" because it "incapacitated (him) for three weeks"); *George v. Associated Stationers*, 932 F. Supp. 1012, 1015-196 (N.D.Ohio 1996) (finding a "serious health condition" where the plaintiff's communicable chicken pox prevented him from working for over three days); *Hott v. VDO Yazaki Corp.*, 922 F. Supp. 1114, 1128 (W.D.Va. 1996) (noting incapacity requirement and granting employer summary judgment where condition would last ten days but where "the plaintiff was able to perform the functions of her position"); *Gudenkauf v. Stauffer Communications, Inc.*, 922 F. Supp. 465, 474-76 (D.Kan. 1996) (holding employer's refusal to grant leave did not violate the FMLA where the employee failed to prove that her condition "kept her from performing the functions of her job"); *Bauer v. Dayton-Walther Corp.*, 910 F. Supp. 306, 310-11 (E.D.Ky. 1996) (finding no FMLA violation upon no showing of requisite incapacity period); *Brannon v. Oshkosh B'Gosh, Inc.*, 897 F. Supp. 1028, 1036-37 (M.D.Tenn. 1995) (holding employee's condition did not require FMLA leave because

> she was not "incapacitated for more than three calendar days," but employee's daughter's fever qualified because it kept her from day care); *Seidle v. Provident Mutl. Life Ins. Co.*, 871 F. Supp. 238, 243 (E.D.Pa. 1994) (requiring employee to demonstrate her child underwent "a period of incapacity requiring absence from his day care center for more than three days." *Id.*

Since *Martyszenko*, other Courts have continued to do the two prong/bright line analysis. See *Joslin v. Rockwell International Corporation*, F. Supp. 2d 1158, 1160 (N.D. Iowa 1998); *Albert v. Runyon*, 6 F. Supp. 2d 57, 61 (D.Mass. 1998); *Robert v. Human Development Association*, 4 F. Supp. 2d 154, 159 (E.D.N.Y. 1998); *Mora v. Chem-Tronics, Inc.*, 16 F. Supp. 1192, 1204 (S.D.Cal. 1998); *Olsen v. Ohio Edison Co.*, 979 F. Supp. 1159, 1163 (N.D. Ohio 1997); *Hodgens v. General Dynamics Corp.*, 144 F.3d 151 (1st Cir. 1998); *Beal v. Rubbermaid Commercial Products, Inc.*, 972 F. Supp. 1216 (S.D. Iowa 1997).

For this Court to accept Gemini's position, this Court would have to overrule each and every case set forth above. Gemini cites no cases where there is a conflict between the Eighth Circuit Court's decision in this case and any other decision.

In sum, Gemini has failed to provide any basis for this Court to exercise its discretion to grant certiorari. There has been no identification of a conflict, no error in interpretation or application of a Federal Statute and no broader purpose necessitating consideration of Gemini's claims by this Court. As a result a Writ of Certiorari should be denied.

CONCLUSION

For the reasons set forth in this brief, this Court should deny the Petition for Writ of Certiorari as requested.

Respectfully submitted,

DALE L. PUTNAM
PUTNAM LAW OFFICE
518 Montgomery Street
P. O. Box 70
Decorah, Iowa 52101
(319) 382-2984

Dated this 27th of July, 2000.